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April 4, 2006

**Via Electronic Filing**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S. W.  
Washington DC 20554

**Re:** Written Ex Parte Submission -WT Docket No. 03-66

Dear Ms. Dortch:

This letter is on behalf of Hispanic Information and Telecommunications Network, Inc. ("HITN"), the largest holder of Educational Broadband Service ("EBS") spectrum in the United States.

In crafting final rules in the above-referenced proceeding pertaining to the maximum length of EBS leases, the Commission should make very clear in the order on reconsideration that any further extension of the allowable maximum lease term is not intended to continue allowing legacy operators a loophole not closed by the Commission when it first extended maximum allowable EBS (then ITFS) lease terms from 10 to 15 years.

When the Commission extended the maximum allowable lease term from 10 to 15 years to give operators further flexibility respecting plans to use EBS spectrum for new two-way uses under seemingly future two-way EBS leases, the Commission failed to address the issue whether a legacy operator could use the new 15 year lease term maximum to extend a legacy one-way video only use lease entered into

prior to 1997 when the First Two-Way Order NPRM<sup>1</sup> was issued, from a 10 year maximum lease term allowed under the old rules to a 15 year maximum term for new uses contemplated in the First Two Way-Order. As a result, legacy operators have taken the position, including with HITN and many other EBS licensees over the past 7-8 years, that legacy leases that contemplated any potential for a greater than 10 year term, were automatically extended to a 15 year term.

This has been a major problem for two important reasons. First, this has enabled operators to continue enforcing leases entered into under the old rules that contemplated one-way video uses only for a maximum term of 10 years for significantly longer terms, notwithstanding the spectrum has not been used for that purpose by most operators for at least the past 10 years. This has enabled legacy operators to warehouse and hold EBS spectrum hostage under the pretense that the FCC blessed their ability to enforce longer legacy lease terms under the guise of the new two-way rules contemplating these operators to enter into new 15-year lease terms. Second, this has prevented many EBS licensees from having full flexibility and freedom on a level playing field to negotiate new two-way lease terms with an existing operator leasing the channels or a new operator of their choice because of the threat of litigation pertaining to legacy operator claims of automatically extended over ten year one-way video lease terms purportedly condoned by the Commission.

As an example of how this could be a major problem for an EBS licensee, the Commission should consider the following potential case.<sup>2</sup> A licensee entered into an excess capacity lease with Legacy Operator X on November 1, 1995 that allowed the Operator to use Licensee's EBS channels for one-way video use for a term of 10 years, or until November 1, 2005. The lease also contemplates two additional 10-year renewal terms if FCC rules ever allow for lease terms longer than 10 years. Licensee has been receiving \$2,000 a month in lease payments throughout the term. On November 1, 2005, Licensee notifies Legacy Operator X that it is prepared to negotiate a new lease with Legacy Operator X for new two-way uses on Licensee's EBS channels, to the benefit of Legacy Operator X and Licensee, and Licensee makes a proposal for a new lease. However, Legacy Operator X does not intend to provide any two-way services on the spectrum into the foreseeable future (if ever), and responds to Licensee that pursuant to the FCC's extension in 1998 of the maximum allowable lease term to 15 years, Legacy Operator X is electing to extend the legacy lease until November 1, 2010. Around the same time, Licensee has received a proposal from New Operator Y for the lease of its EBS channels to be

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<sup>1</sup> In re Amendment of Parts 1, 21 and 74 to Enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions, Notice of Proposed Rulemaking, 12 FCC Rcd.22174 (1997) ("First Two-Way Order").

<sup>2</sup> At the request of the Commission, HITN can provide numerous and voluminous examples of leases containing this type of language that a legacy operator can rely on to extend a legacy analog one way video lease for a significantly longer term for the purpose of warehousing spectrum, as well as specific cases where this is actually occurring.

immediately developed as part of a new two-way wireless broadband system, with lease payments of \$10,000 a month.

In this example, Licensee is faced with the Hobson's Choice of having its Channels warehoused by Legacy Operator X for an additional 5 years or more (if the Commission extends allowable lease terms of longer than 15 years) because Legacy Operator X does not intend to deploy a new wireless broadband system on Licensee's Channels or Legacy Operator X desires to prevent New Operator Y from entering the market and immediately deploying a wireless broadband system. Either way, Licensee and the public lose. Licensee loses because, among other reasons, its spectrum is being warehoused indefinitely and may not be put to new uses for a long time, if ever. The public (and the Commission) loses because the spectrum is not being put to the new uses for which it is intended to serve the public interest.

To close this loophole, the Commission must specify in the order on reconsideration that for any leases contemplating one-way video only use entered into prior to the release of the 1997 First Two Way Order NPRM when the public was on notice of potentially longer lease terms for leases allowing new two way or other uses, any later Commission rules permitting longer than 10 year lease terms may not be relied on by legacy operators to cause the extension of those leases beyond then current rules in effect allowing 10 year maximum lease terms. This will serve the public interest and facilitate more immediate use of EBS spectrum for new two-way uses, and prohibit legacy operators from warehousing spectrum under legacy one-way video only leases under the pretense of a purported Commission blessing through its intent to allow longer term new two-way leases.

Very truly yours,

/s/ Rudolph J. Geist

cc: (VIA E-Mail)  
Fred Campbell  
John Giusti  
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Catherine Seidel  
Peter Corea  
Walter Strack

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